

**United States
Court of Appeals
FOR THE NINTH CIRCUIT**

FLORENCE UMBRIACO,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

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Appellant,

v.

FLORENCE UMBRIACO,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE AND CROSS-APPELLANT

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INDEX

	Page
JURISDICTION	1
STATEMENT OF THE CASE.....	1
SPECIFICATION OF ERRORS.....	12
SUMMARY OF ARGUMENT.....	12
ARGUMENT	15
CONCLUSION	39

TABLE OF CASES

<i>Allen v. United States</i> , 194 Fed. 664, 4 Cir., 1912.....	30
<i>Doan v. United States</i> , 202 F. 2d 674, 9 Cir., 1953.....	38
<i>Fotie v. United States</i> , 137 F. 2d 831, 8 Cir., 1943.....	30
<i>Hart v. United States</i> , 131 F. 2d 59, 9 Cir., 1942.....	30
<i>Llanos-Senarillos v. United States</i> , 177 F. 2d 164, 9 Cir., 1949	30
<i>Radomsky v. United States</i> , 180 F. 2d 781, 9 Cir., 1950..	16, 20
<i>Smith v. United States</i> , 169 F. 2d 118, 6 Cir., 1948.....	30
<i>United States v. Hiss</i> , 185 F. 2d 822, 2 Cir., 1950, cert. den., 345 U.S. 942, 73 S.Ct. 830, 97 L.Ed. 1368.....	32
<i>United States v. Marachowsky</i> , 201 F. 2d 5, 7 Cir., 1953, cert. den., 345 U.S. 965, 73 S.Ct. 949, 97 L.Ed. 1384.....	32
<i>United States v. Margolis</i> , 138 F. 2d 1002, 3 Cir., 1943.....	30
<i>United States v. Norris</i> , 1936, 300 U.S. 564, 57 S.Ct. 535, 81 L.Ed. 808	30
<i>United States v. Palese</i> , 133 F. 2d 600, 3 Cir., 1943.....	32, 35
<i>United States v. Remington</i> , 191 F. 2d 246, 2 Cir., 1951, cert. den., 343 U.S. 907, 72 S.Ct. 580, 96 L.Ed. 1325.....	21, 22, 23, 32

TABLE OF CASES (*Continued*)

	Page
<i>United States v. Rose</i> , 113 F. Supp. 775, USDC Pa., 1953, 215 F. 2d 617, 3 Cir., 1954.....	29, 30
<i>United States v. Seavey</i> , 180 F. 2d 837, 2 Cir., 1950, cert. den., 339 U.S. 979, 70 S.Ct. 1023, 94 L.Ed. 1383.....	32
<i>United States v. Slutzky</i> , 79 F. 2d 504, 3 Cir., 1935.....	30
<i>Vetterli v. United States</i> , 198 F. 2d 291, 9 Cir., 1952, judg- ment vacated on other grounds, 344 U.S. 872, 73 S.Ct. 175, 97 L.Ed. 675.....	35, 36
<i>Weiler v. United States</i> , 1945, 323 U.S. 606, 65 S.Ct. 548, 89 L.Ed. 495	16

STATUTES

18 U.S.C. 1621	2
18 U.S.C. 2421	2

OTHER AUTHORITIES

34A <i>Words and Phrases</i> 507.....	18
41 Am. Jur., <i>Perjury</i> , § 7, p. 7.....	30

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JURISDICTION

The appellee and cross-appellant accepts the statement of jurisdiction contained in the brief of appellant.

STATEMENT OF THE CASE

On April 3, 1957, at Seattle, Washington, the ap-

pellant, having been called as a witness by the United States and having taken an oath before the United States District Court for the Western District of Washington, Northern Division, in the case of *United States of America v. Frank Peter Umbriaco*, Western District of Washington, Northern Division, Criminal No. 49580, testified to material matters in that case involving charges of violating the White Slave Traffic Act. Title 18 U.S.C. § 2421 (Plaintiff's Exhibit 1, Tr. 78; Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580).

Subsequently an indictment was returned against appellant which was filed on April 10, 1957, charging her in two counts with committing perjury in violation of Title 18 U.S.C. § 1621. The perjury alleged in each count arose from her testimony in the trial of *United States v. Frank Peter Umbriaco, supra*. Count I charged that she perjured herself by testifying that during the eight-month period from June 1952 to February 1953 she did not operate as a prostitute at the Stewart Hotel in Seattle, Washington, and that during the same period she did not perform any acts of prostitution at the Stewart Hotel in Seattle, Washington. Count II charged that she perjured herself by testifying that during the period from September 1954 to December 1955 she did not operate as a prosti-

tue (Tr. 3, 4). After trial of the cause, the jury on September 11, 1957, returned a verdict of guilty as to each count of perjury. Subsequently, on September 23, 1957, the trial court granted a motion of acquittal as to Count I (Tr. 6). On September 30, 1957, the appellant was sentenced to 18 months imprisonment (Tr. 7, 8).

The evidence offered by the Government on Count I of the indictment may be summarized as follows:

During the trial of Frank Peter Umbriaco, the appellant, testified as follows:

Q. During this eight-months period did you ever operate as a prostitute at the Stewart Hotel?

A. No.

Q. Did you ever perform any acts of prostitution at the Stewart Hotel?

A. No. (Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, p. 43)

The eight-month period referred to above was the eight-month period commencing in June 1952 and continuing to February 1953 (Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, p. 39-43).

Condie M. May, resident manager of the Stewart Hotel, testified that he was the official custodian of the records of the Stewart Hotel, identified Plaintiff's Ex-

hibit 3 as a registration sheet of the Stewart Hotel which was admitted into evidence, and testified that the registration sheet showed the registration of Frank and Mrs. LaMar at the Stewart Hotel for the dates of June 19 through 24, 1952 (Tr. 16, 17). The appellant and her husband were known at the Stewart Hotel during that period as Frank and Florence LaMar (Tr. 19).

Mr. Hass, a bellman at the Stewart Hotel, called appellant on the telephone at her Seattle home shortly after he met her at the Stewart Hotel. He asked the appellant to come to the hotel saying, "I have a deal for you." The appellant replied that she would come to the hotel. Mr. Hass called the appellant after a request by a guest at the hotel for a girl for purposes of prostitution. Shortly after the telephone call the appellant appeared at the hotel. Mr. Hass, who was operating the elevator, took her to the floor where the guest was awaiting her and escorted her to the room. Sometime later Mr. Hass saw the appellant in the elevator on her way out of the hotel and appellant gave him some money. On other occasions Mr. Hass saw the appellant at the Stewart Hotel (Tr. 19-22).

Marius Martell, a bellman at the Stewart Hotel during the period from June 1952 through February 1953, met Florence Umbriaco in the side lobby of the

Stewart Hotel during her stay at the hotel in June 1952. On that occasion Florence Umbriaco told him she was "working" and gave him her telephone number. About one month later, Mr. Martell called Florence Umbriaco at the telephone number given him on the previous occasion. He told her to come down to the hotel. She answered that she would be right down. Within a short time she came to the hotel. Mr. Martell testified that the reason for his calling her was that a guest wanted a girl for purposes of prostitution. Approximately one-half hour after Florence Umbriaco arrived at the hotel and had been directed to a certain room number, Mr. Martell met her again and Florence Umbriaco gave him some money. About two weeks later Mr. Martell called Florence Umbriaco at the same number and asked her to come to the hotel. The appellant said she would be right down. The reason Mr. Martell called her was again for purposes of prostitution with a guest in one of the rooms in the Stewart Hotel. Mr. Martell testified that he directed Florence Umbriaco to a particular room in the Stewart Hotel; that she went up to the room and immediately came down stating that no one was there (Tr. 25-30).

Mr. Alfred G. Gunn, a special agent of the Federal Bureau of Investigation, testified that he had a conversation with Florence Umbriaco during the night of November 3, 1956 (Tr. 50). Mr. Gunn related that

Florence Umbriaco advised him on that occasion that she came to Seattle in June 1952 with Frank Umbriaco and that upon her arrival she checked into the Stewart Hotel. Immediately thereafter Frank Umbriaco made arrangements with various bellmen for Florence Umbriaco to work as a prostitute while living at the Stewart Hotel. She told Mr. Gunn that she did work as a prostitute at the Stewart Hotel while she was there and while she and Frank lived in an apartment at the Cambridge Hotel from the latter part of June 1952 until February 1953. Florence Umbriaco advised Mr. Gunn that she worked as a call prostitute at the Stewart Hotel and several other hotels in Seattle during that eight-month period (Tr. 51, 52). Mr. Gunn further testified that he had a conversation with Florence Umbriaco on the morning of December 11, 1956, and again that Florence Umbriaco advised him that she practiced prostitution at various hotels in Seattle during the period June 1952 until February 1953, including operating as a prostitute at the Stewart Hotel.

Vernon P. Coyne, a special agent of the Federal Bureau of Investigation, testified that on June 12, 1957, in the presence of Edward Leo Breen, Jr., a special agent of the Federal Bureau of Investigation, Florence Umbriaco advised them that the statements which she had given Alfred G. Gunn were the absolute

truth. She further advised Mr. Coyne and Mr. Breen that during the period June 1952 until February 1953 she had worked as a call girl in the various hotels in Seattle and that prior to her testifying on April 3, 1957, in the *Frank Peter Umbriaco* case she had the bellboys who she thought were going to testify in that case come into her room and they discussed the testimony that they would give. In particular, in connection with a bellboy by the name of Kenny from the Stewart Hotel, Florence Umbriaco told Mr. Coyne and Mr. Breen that Kenny was only going to say that, "He called me twice and that is a laugh because I make my living that way and if he or any bellboy say they called me twice they are committing perjury because I made my living that way and how could I live unless they called me?" (Tr. 60-62)

Edward Leo Breen, Jr., a special agent of the Federal Bureau of Investigation, testified substantially the same as Mr. Coyne with regard to the conversation of June 12, 1957 (Tr. 66-68).

The evidence offered by the Government as to Count II may be summarized as follows:

From September 1954 through December 1955 Florence Umbriaco resided in the following places for the following periods of time: Four days at the Stewart Hotel in Seattle (Plaintiff's Exhibit 2, Court

Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, p. 49); an apartment on 11th North in Seattle for a period of one year, and the Roygate Apartments at 705 East Thomas for a period of four or five months (Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, p. 50).

The testimony of Florence Umbriaco during the trial of Frank Peter Umbriaco which gave rise to the charge contained in Count II of the indictment is as follows:

Q. During the time you were living at the Stewart Hotel on this occasion in the fall of 1954, did you operate as a prostitute?

A. No. (Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, p. 55)

* * * * *

Q. And then when you moved up to 11th North, did you operate as a prostitute?

A. No. (Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, p. 55)

* * * * *

Q. During the time you lived there on East Thomas in the Roygate Apartments, did you operate as a prostitute?

A. No. (Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, p. 57)

Edward J. Denny, a bellman at the Hungerford Hotel in Seattle, testified that during August 1954 he called Florence Umbriaco for the purpose of committing an act of prostitution with a guest at the Hungerford Hotel (Tr. 32). Upon her arrival at the hotel Mr. Denny directed her to a hotel room. Approximately one-half hour later Florence Umbriaco came down from the hotel room and on leaving the hotel gave Mr. Denny some money and told him that he could call her at any time (Tr. 33, 34). Mr. Denny testified that thereafter he called Florence Umbriaco five or six times during the four months following August 1954 for the purpose of prostitution at the Hungerford Hotel; that on each of those occasions he gave her a room number to go to and that when Florence was ready to leave she would call for him; that he would go to the hotel room, knock on the door, that they would meet in the elevator and on the way down she would give him money (Tr. 35, 36).

Gail Gordon Campbell testified that he was a janitor at the Washington Athletic Club; that he knew the defendant in this cause as Flo Andrews; that he met her during the end of 1953 at the Astor Hotel; and that he knew the defendant for a period of four years following his initial meeting with her (Tr. 38, 39, 40). Mr. Campbell testified that during the fifteen-month period commencing in September 1954

through December 1955 he had sexual intercourse with Florence Umbriaco for money approximately once each month; that on each occasion he paid her fifty dollars and that these acts of sexual intercourse occurred in different hotels in the city of Seattle (Tr. 40, 41).

Thomas Hutchings, a bellman at the Morrison Hotel, testified that he knew the defendant as Florence LaMar (Tr. 43, 44) and met her in 1953. Mr. Hutchings testified that during the period between September 1954 and December 1955 he was working at the Morrison Hotel as a bellman (Tr. 44); that during the period September 1954 to December 1955 he called Florence Umbriaco on the telephone on three or four occasions; that he called her on each occasion to perform an act of prostitution at the Morrison Hotel; that on each occasion she would arrive at the hotel approximately one-half hour after the telephone conversation; that he would direct her to a particular hotel room on each occasion and that generally one-half hour after taking her to a hotel room he would see her again at which time she would pay him money (Tr. 44, 45, 46).

Mr. Alfred G. Gunn, in connection with the charges contained in Count II of the indictment, testified that he had a conversation with Florence Umbriaco on November 3, 1956; that during this conversation she advised him that in September 1954 she and

Frank Umbriaco returned to Seattle from a trip they had made to Eureka, California; that they at that time resided at the Stewart Hotel for a few days during which time she immediately started practicing prostitution in Seattle. She told Mr. Gunn that after leaving the Stewart Hotel in September 1954 she and Frank Umbriaco lived on Capitol Hill at an address on 11th Street and subsequently in an apartment at 705 East Thomas; that during that period of time (the period of time involved in Count II) she worked as a prostitute at various hotels in Seattle, including the Hungerford, the St. Regis, the Morrison, the Stewart, and the Stratford (Tr. 52, 53). Mr. Gunn further testified that he had a conversation with Florence Umbriaco on the morning of December 11, 1956, and that on that occasion Florence Umbriaco told Mr. Gunn the same things that she had told him in her conversation with him on November 3, 1956, with regard to her coming back from a trip to Eureka, California, the places she lived, and the places she practiced as a call prostitute in the various hotels in Seattle (Tr. 54).

Mr. Vernon P. Coyne testified that on June 12, 1957, in the presence of Edward Leo Breen, Jr., Florence Umbriaco advised them that she had worked as a call girl during the period September 1954 to December 1955; that she worked out of the various hotels in Seattle. She further advised Mr. Coyne and Mr.

Breen that Gail Gordon Campbell, during the period September 1954 through December 1955, was a regular trick of hers whom she charged fifty dollars for each act of prostitution (Tr. 61, 62).

Edward Leo Breen, Jr., testified substantially the same as Mr. Coyne with regard to the conversation of June 12, 1957 (Tr. 67, 68, 69).

At the close of the evidence the defendant moved for acquittal as to each count charged. On September 11, 1957, the jury returned a verdict of guilty as to each count in the indictment (Tr. 5). On September 23, 1957, the Court granted the defendant's motion for acquittal as to Count I of the indictment (Tr. 6).

SPECIFICATION OF ERRORS

Cross-appellant submits that the trial court committed error in granting defendant's motion for acquittal as to Count I of the indictment for the reason that the evidence introduced by the plaintiff was sufficient to sustain the charge of perjury thereunder.

SUMMARY OF ARGUMENT

1. The trial court erred in granting Florence Umbriaco's motion for acquittal as to Count I of the indictment for the reason that the evidence introduced

by the Government was sufficient to sustain the charge of perjury therein contained.

In granting the motion for acquittal as to Count I the trial court concluded that the Government's evidence did not comply with the rule requiring the falsity of an accused's statement to be established by two independent witnesses or by one witness and corroborating circumstances. The Court's reasoning was that the Government's evidence was insufficient because there was no witness to testify to having performed any act of sexual intercourse for money with the defendant nor a witness to testify to having observed any act of sexual intercourse for money involving the defendant.

It is the Government's contention that the testimony of the bellmen, Hass and Martell, that Florence Umbriaco had conversations at the Stewart Hotel during the time involved soliciting their services to arrange future dates with guests at the hotel for purposes of prostitution and gave the bellmen her name and telephone number, that after telephone calls from these bellmen to obtain her services for a guest at the hotel to perform an act of prostitution she arrived at the hotel and went to the hotel room to which the particular bellman directed her and that one-half hour or so later she left after turning some money over to the bellman and asking the bellman to call her again, is di-

rect and positive testimony of overt acts from which the jury could infer Florence Umbriaco's actual belief when she testified.

2. The statements of the appellant which are excerpted on pages 6 - 9 of appellant's brief from Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, do not amount to admissions that she operated as a prostitute during the period alleged in Count II. Further, even if those statements did amount to admissions or a retraction of her denial that she operated as a prostitute during the period September 1954 through December 1955, it is clear that such would not excuse the false testimony given, for the offense of perjury is complete when a witness's statement has once been made.

3. There can be no question concerning the sufficiency of the evidence under Count II when it is realized that the testimony of the bellmen, Denny and Hutchings, similar to that described in 1 above, is direct testimony of overt acts from which the jury could infer Florence Umbriaco's actual belief when she testified.

Even were we to accept appellant's contention that the testimony of the bellmen is circumstantial, since it establishes the falsity of Florence Umbriaco's testimony in the particular charged in the *Frank Peter*

Umbriaco trial it is sufficient corroboration of the direct testimony of Gail Gordon Campbell that he performed acts of sexual intercourse for money with appellant during the period involved. Further, the corroborating evidence of Special Agents Coyne and Breen which supports Campbell's testimony clearly complies with the rule in perjury cases. The evidence introduced on Count II was sufficient to support the jury's verdict.

ARGUMENT

I.

The trial court erred in granting Florence Umbriaco's motion for acquittal as to Count I of the indictment for the reason that the evidence introduced by the Government was sufficient to sustain the charge of perjury therein contained.

Count I of the indictment charges that Florence Umbriaco committed perjury when she testified in the case of *United States v. Frank Peter Umbriaco* by stating that during the eight-month period from June 1952 to February 1953 she did not operate as a prostitute at the Stewart Hotel in Seattle, Washington, and that during the same period she did not perform any acts of prostitution at the Stewart Hotel in Seattle, Washington. The evidence in support of the Government's position with regard to this count consists of

the direct testimony of Walter Hass and Marius Martell to the mode of operation of Florence Umbriaco as a prostitute at the Stewart Hotel during the eight-month period from June 1952 to February 1953. Further corroborating the testimony of the two bellmen was the testimony of the resident manager of the Stewart Hotel that Florence Umbriaco resided at the Stewart Hotel from June 19 to June 24, 1952, and the testimony of Alfred G. Gunn, Vernon P. Coyne and Edward Leo Breen, Jr., special agents of the Federal Bureau of Investigation, through conversations had with Florence Umbriaco when she admitted that she committed acts of prostitution at the Stewart Hotel during the alleged period.

It is of course the law in perjury cases that the prosecution must establish the falsity of the statement made by the accused by the testimony of two independent witnesses or by one witness and corroborating circumstances. *Weiler v. United States*, 1945, 323 U.S. 606, 65 S.Ct. 548, 89 L.Ed. 495. It is further the law that circumstantial evidence alone, no matter how persuasive, is never enough to sustain a conviction. *Radomsky v. United States*, 180 F. 2d 781, 9 Cir., 1950, at page 783.

In order to grant the motion for acquittal as to Count I the lower court concluded that the Govern-

ment's evidence did not comply with the above rule. The Court's reasoning was that the Government's evidence was insufficient because there was no positive and direct evidence of perjury inasmuch as there was a failure to produce a witness to testify to having performed any act of sexual intercourse for money with the defendant during the period involved and at the place named and/or that the Government failed to produce a witness to testify to having actually observed any act of sexual intercourse for money involving the defendant. The question then is whether the failure to produce such testimony must necessarily operate to mean that there was no direct and positive evidence of the kind of perjury charged here. It is submitted that the failure to produce the kind of testimony referred to should not result in an acquittal.

It must be carefully kept in mind that the charge of perjury did not relate to an allegation of having given false testimony concerning whether any acts of sexual intercourse had occurred during a given period or on a particular occasion but instead related to whether or not Florence Umbriaco had operated as a prostitute during a given period or had performed any act of prostitution at the Stewart Hotel during a given period. If the charge was that there was willful false testimony concerning individual acts of sexual intercourse, then admittedly it would be nec-

essary to produce either an eye-witness to such act or a person who was so involved. But in the charge herein we are concerned with a course of conduct and an act of prostitution. With regard to the first part of Count I we are concerned with the activities and occupation of an individual over a period of time, not with any particular incident as such. In this view, how does the party charged with the burden of proof go about bringing in direct and positive evidence of a course of conduct or the nature of one's operations over a given period of time? With regard to the second part of Count I, what is direct and positive evidence of an act of prostitution?

In this case, inasmuch as we are concerned with Florence Umbriaco's operations as a prostitute and whether she performed an act of prostitution during the time and at the place alleged, it is first necessary to determine the meaning of that word or term. A prostitute is generally defined as a female given to indiscriminate lewdness or to promiscuous sexual intercourse for gain. See 34A *Words and Phrases* 507. One who operates as a prostitute would be one who engages in a course of conduct of indiscriminately giving herself to lewdness for gain. What is direct and positive proof of such conduct? It is submitted that direct and positive testimony of such conduct is testimony of conversations by Florence Umbriaco with a bellman at a

particular hotel; soliciting of the bellman's services for future dates for prostitution with guests at the hotel; giving of one's name and telephone number to the bellman; advising the bellman that one is available for prostitution; coming to the hotel immediately after being called by a bellman with whom the previous conversation occurred after having been called by him because a guest at the hotel desired a woman for the purpose of performing an act of prostitution; going to the room as directed by the bellman; turning some money over to the bellman a half hour to forty-five minutes later upon leaving the hotel; and the parting conversation with the bellman to the effect of "Call me again." All of the foregoing is the usual routine mode of operation of a prostitute or one engaged in operations as such. Each is an overt act from which the jury may infer the appellant's belief and the testimony of such acts in this case were positive and direct that Florence Umbriaco operated as a prostitute during the period in question.

With regard to her perjury in denying that she performed an act of prostitution at the Stewart Hotel during the period involved, the Court's reasoning was the same as related to the appellant's operations as a prostitute during the period involved, i.e., that the Government's case failed because there was no direct and positive testimony by a participant in an act of

sexual intercourse for money with the appellant and/or by one who observed such an act and that the evidence was circumstantial.

The distinction between what evidence is circumstantial and what evidence is direct is set forth in *Radomsky v. United States, supra*, at page 783, wherein this Court states in part as follows:

“Of course, the distinction between circumstantial and positive evidence must be taken in a practical sense. Thus, if a witness had testified to seeing someone other than appellant mail the letter it would be direct evidence that appellant did not mail it notwithstanding the necessity of an inference based on experience that a letter deposited in the mail by one person cannot, before arriving at its destination, have been deposited in the mail by another person. The possibility of the letter’s being mailed twice is so negligible that the evidence would be direct for all intents and purposes.”

Similarly in this case, at least in the practical sense referred to in *Radomsky*, direct evidence that Florence Umbriaco had conversations with bellmen at the Stewart Hotel during the time involved soliciting their services to arrange future dates with guests at the hotel for purposes of prostitution and giving the bellmen her name and telephone number to gain that end, that after telephone calls from these bellmen to obtain her services for a guest at the hotel to perform an act of prostitution she arrived at the hotel and went to the hotel room to which the particular bellman di-

rected her, and that one-half hour or forty-five minutes later she left after turning some money over to the bellman and asking the bellman to call her again, would be direct evidence that Florence Umbriaco operated as a prostitute during the period to which such testimony related and that on each particular occasion she performed an act of prostitution. Under such circumstances the possibility that she did not operate as a prostitute or that she did not perform an act of prostitution is so negligible that the evidence would be direct for all intents and purposes.

Of even more telling significance is the decision in the case of *United States v. Remington*, 191 F. 2d 246, 2 Cir., 1951, certiorari denied 343 U.S. 907, 72 S.Ct. 580, 96 L.Ed. 1325, which was concurred in by Judges Swan, Augustus N. Hand and Learned Hand. In that case the indictment charged the defendant with the offense of perjury in that he testified before a grand jury that he had never been a member of the Communist Party and that such testimony was wilfully and falsely given. As the Court points out, it is of course necessary in establishing the contrary to what the defendant testified to that there be some proof of his having joined the Communist Party. The Court then went on to discuss what would constitute direct and positive evidence of membership in the Commu-

nist Party and in so discussing, we believe, touched upon matters at page 249 that are pertinent here:

“Since the crime of perjury consists in the contradiction between the accused’s oath and his belief, the only ‘direct’ evidence of his guilt would seem to be his own declarations of his belief. But the law is well settled that his declarations, if oral, will not satisfy the rule, although they will if written and adequately corroborated. This distinction was laid down in *United States v. Wood*, 14 Pet. 430, 10 L.Ed. 527, which has been often followed. Since only written declarations will suffice, it follows that if the critical issue must be proved by ‘direct’ evidence, there could be no conviction unless the accused had made contradictory written declarations. But it is clear that perjury convictions are not limited to such cases. Hence it must be that the rule peculiar to perjury as to the character of the proof, means that it is the facts from which the jury may infer the accused’s state of mind that must be proved by ‘direct’ evidence. And this view is confirmed by Chief Justice Vinson’s opinion in *American Communications Ass’n. v. Douds*, 339 U.S. 382, 411, 70 S.Ct. 674, 690, 94 L.Ed. 925, where it said: ‘* * * while objective facts may be proved directly, the state of a man’s mind must be inferred from the things he says or does. * * * False swearing in signing the affidavit must, as in other cases where mental state is in issue, be proved by the outward manifestations of state of mind. In the absence of such manifestations, which are as much ‘overt acts’ as the act of joining the Communist Party, there can be no successful prosecution for false swearing.’

“Hence the doctrine that perjury must be proved by the direct testimony of two witnesses or one corroborated witness means that the witnesses

must testify to some 'overt act' from which the jury may 'infer' the accused's actual belief."

It should be borne in mind that the issue is not whether or not appellant falsely denied performing an act or acts of sexual intercourse but whether or not she falsely denied operating as a prostitute and performing an act of prostitution at the Stewart Hotel during the period referred to. In connection with the proof required, the trial court concluded that the direct testimony required must establish all of the overt acts which comprise operation as a prostitute and an act of prostitution. But it is submitted that within the meaning of the *Remington* case, *supra*, not all of the overt acts in the kind of perjury here charged must be established by direct evidence but rather the direct testimony must relate to one or more of the overt acts which comprise an act of prostitution and operation as a prostitute from which the jury may infer the appellant's actual belief. Although the Second Circuit reversed in the *Remington* case, it reversed on the basis of the trial court's instruction to which proper exception was taken. No such exception was taken in this case and the trial court's instructions are not before this Court.

In the instant case if there was testimony to specific acts of sexual intercourse for gain it would simply be testimony of other overt acts which would

establish the operations of the defendant as a prostitute over the given period. We believe that there are many other overt acts which were in fact testified to herein and which fully justified the verdict of the jury as to Count I. Such overt acts were testified to directly and positively by the persons who had the meetings and conversations with the defendant. But even with regard to evidence of acts of sexual intercourse, it should be noted that although evidence of such is not direct it is present in this case through the admission of the appellant to which Special Agents Gunn, Coyne and Breen testified. The evidence introduced by the Government is such direct and positive evidence to sustain the burden which is placed upon the Government in perjury cases.

It is submitted that the Court below was in error in granting defendant's motion for acquittal as to Count I and this Court should reverse and remand this case as to Count I.

II.

The appellant in its brief, under the heading Assignment I, contends that the evidence introduced by the Government was insufficient to sustain the charge of perjury contained in Count II for the reason that the answers given by the appellant were legally truthful. In the appellant's brief on pages 7, 8 and 9, ex-

cerpts from the testimony of Florence Umbriaco given in the trial of Frank Peter Umbriaco are set forth. Apparently the appellant from these excerpts is contending that in her testimony she has admitted practicing prostitution within the period set forth in Count II.

The first excerpt, cited on page 7 of appellant's brief, from Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, page 52, contains the answer to a question as follows:

"No, I had a friend of mine a couple of times that came up to visit me there, but it wasn't an act of prostitution. -I wouldn't call it."

Clearly this is a denial of committing an act of prostitution and certainly does not amount to an admission that she operated as a prostitute during the period between September 1954 through December 1955.

The next excerpt from Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580 at page 56, cited on page 7 of appellant's brief, admits to having an act of sexual intercourse with an individual but does not admit that it was for money. She clearly states in answer to the question, "Was that for money?" "I don't know how you would want to class that. He has loaned me a great

deal of money during the years." Certainly the answer of appellant to the question posed does not indicate that any sexual intercourse she may have had with the friend referred to at that phase of her testimony was for money. In addition, the context of that entire excerpt from page 56 of Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, does not indicate that the witness Florence Umbriaco was admitting that she operated as a prostitute during the period September 1954 to December 1955.

The excerpt contained in appellant's brief from page 57 of Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, does not relate to the period between September 1954 and December 1955, but rather to the entire period from September 1952 to the time of the trial. Further, the entire testimony from the excerpt on pages 7 and 8 of appellant's brief, from page 57 of Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, did not amount to an admission that Florence Umbriaco operated as a prostitute during the period September 1954 to December 1955. The question asked encompassed a greater period of time than that involved in Count II and from the question and its context we cannot know whether she admitted sexual

intercourse for money with one person during the period involved in Count II or whether her admission related to the period within the question asked which was outside the period involved in Count II. Further, though she admits sexual intercourse for money with one person during the period asked in that particular question her answer in the context asked cannot be construed as an admission that she operated as a prostitute during the period referred to in Count II, but, if anything, confirms her earlier denial.

Again, on page 8 of appellant's brief, an excerpt is taken from page 62 of Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, wherein Florence Umbriaco admits that during the period between 1952 and 1956 she performed acts of sexual intercourse at the Washington Athletic Club. But neither from the question asked nor the answer given nor the context of her examination can the admission be related to the period of time with which we are concerned in Count II. Further, she does not admit that the sexual intercourse was for money. Clearly this does not amount to an admission that she operated as a prostitute during the specific period from September 1954 to December 1955 nor a repudiation of her earlier answer denying that she operated as a prostitute during this period.

With regard to the excerpt contained on page 8 of appellant's brief from page 63 of Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, again the question encompasses a much greater period of time than that involved in Count II and neither from the question asked nor the answer given nor the context of her examination can the admission be related to the period of time with which we are concerned in Count II. Clearly there can be no question that this is not an admission that she operated as a prostitute during the specific period from September 1954 to December 1955 nor a repudiation of her earlier answer denying that she operated as a prostitute during this period.

Turning now to the language in the indictment, the only testimony charged as false is that Florence Umbriaco testified falsely that she did not operate as a prostitute during the period between September 1954 and December 1955. That period was the time during which Florence Umbriaco lived at the Stewart Hotel, in an apartment on 11th North, and during the period of time she resided at the Roygate Apartments on East Thomas Street in Seattle (See Statement of Facts). The specific questions with regard to whether or not she operated as a prostitute during those periods are as follows:

Q. During the time you were living at the Stewart Hotel on this occasion in the fall of 1954, did you operate as a prostitute?

A. No. (Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, p. 55)

* * * * *

Q. And then when you moved up to 11th North, did you operate as a prostitute?

A. No. (Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, p. 55)

* * * * *

Q. During the time you lived there on East Thomas in the Roygate Apartments, did you operate as a prostitute?

A. No. (Plaintiff's Exhibit 2, Court Reporter's Transcript of Testimony of Florence Umbriaco in Cause No. 49580, p. 57)

Taking the questions asked and the context in which they were asked, it is clear that the excerpts which appear on pages 6, 7, 8 and 9 of appellant's brief do not amount to even an indication that Florence Umbriaco at the time she was answering the questions lacked consciousness of the "nature of the statement made" or that it was "inadvertently made" or there was a "mistake of the import", or there was "lack of corrupt motive". *United States v. Rose*, 215 F. 2d 617, 622, 3 Cir., 1954. Taking those excerpts in the context in which they were asked they do not amount to liter-

ally accurate, technically responsive, or legally truthful answers within the meaning of *Smith v. United States*, 169 F. 2d 118, 6 Cir., 1948; *Hart v. United States*, 131 F. 2d 59, 9 Cir., 1942; *Fotie v. United States*, 137 F. 2d 831, 840, 8 Cir., 1943; *United States v. Slutzky*, 79 F. 2d 504, 505, 3 Cir., 1935; *Allen v. United States*, 194 Fed. 664, 668, 4 Cir., 1912. Neither do these answers amount to admissions or a retraction.

Even if the answers given to the questions excerpted on pages 7, 8 and 9 of appellant's brief could be construed as amounting to a retraction of the testimony charged as false, it is clear that such does not excuse the false testimony given. *United States v. Margolis*, 138 F. 2d 1002, 1003, 3 Cir., 1943; *Llanos-Senarillos v. United States*, 177 F. 2d 164, 9 Cir. 1949; 41 *Am. Jur.*, Perjury § 7, p. 7; *United States v. Rose*, 113 F. Supp. 775, USDC Pa., 1953, reversed on other grounds, 215 F. 2d 617.

In this connection, *United States v. Norris*, 1936, 300 U.S. 564, 574, 57 S.Ct. 535, 81 L.Ed. 808, states as follows:

“Perjury is an obstruction of justice; its perpetration well may affect the dearest concerns of the parties before a tribunal. Deliberate material falsification under oath constitutes the crime of perjury, and the crime is complete when a witness's statement has once been made.”

And further at page 576:

“The plain words of the statute and the public policy which called for its enactment alike demand we should hold that the telling of a deliberate lie by a witness completes the crime defined by the law.”

III.

The appellant apparently contends on the one hand that there has been no direct proof of some element of the crime for which the defendant has been tried and that the verdict is therefore contrary to law and to the evidence (appellant's brief, p. 10), and on the other hand appellant apparently suggests that the only direct evidence is that of Gail Gordon Campbell and there is no corroboration within the requirements of the perjury rule.

It is submitted that the falsity of the statement made by Florence Umbriaco and charged under Count II has been established by three witnesses: Gail Gordon Campbell, Edward J. Denny, and Thomas Hutchings. The testimony of Gail Gordon Campbell that he performed acts of prostitution with appellant during the period in question on a monthly basis and paid her fifty dollars on each occasion cannot seriously be questioned as directly and positively establishing that Florence Umbriaco operated as a prostitute during the period in question. With regard to the bellmen

Denny and Hutchings, their testimony is direct and positive to the overt acts from which the jury could infer that Florence Umbriaco knew her answers to the questions asked were false within the meaning of the *Remington* case, *supra*.

Even if we were to assume that the testimony of the bellmen was circumstantial and considered such testimony in connection with the sufficiency of the corroboration of Gail Gordon Campbell, the strict requirements of the perjury rule have been met. It is clear that circumstantial evidence is sufficient to corroborate the testimony of the single direct witness where that rule is applicable in a perjury case. *United States v. Marachowsky*, 201 F. 2d 5, 15, 7 Cir., 1953; 73 S.Ct. 830, 97 L.Ed. 1368, certiorari denied, 345 U.S. 965; *United States v. Hiss*, 185 F. 2d 822, 2 Cir., 1950; certiorari denied, 345 U.S. 942, 73 S.Ct. 830, 97 L.Ed. 1368; *United States v. Seavey*, 180 F. 2d 837, 3 Cir., 1950, certiorari denied, 339 U.S. 979, 70 S.Ct. 1023, 94 L.Ed. 1383. The problem arises with regard to the nature of the corroboration.

In *United States v. Palese*, 133 F. 2d 600, 3 Cir., 1943, at the trial of the defendant on perjury charges, the Government called three witnesses. The stenographer who took the notes at the grand jury proceeding testified that the defendant stated under oath

to the grand jury that he did not pay any person for voting at the November 5, 1940 general election. A Leon Wheatley testified that while on his way to the polls to vote some time between three and five o'clock P. M. on November 5, 1940, he met the defendant, whom he knew, and who said to him "I got \$2 if you want to vote." Wheatley testified further that the defendant then handed him a ballot and that he voted that ballot, and that after he left the polls he walked across the street with the defendant who then gave him \$2 for his vote.

The third witness, Edna Jackson, testified that the defendant called for her in his car the morning of November 5, 1940, and asked whether she was going to vote, gave her a ballot which she did not examine and drove her to the polls; that she voted the ballot given her; that the defendant drove her home and on the way gave her \$1.50 and that the defendant did not owe her any money. The witness, replying to the court's question "Did he give you \$1.50 to vote?" answered "No, sir," and to the further question "For what purpose did he give you the \$1.50?" answered "I do not know."

The defendant appealed in that case contending that the Government's evidence did not meet the stand-

ards required in perjury cases. The Court said at page 602:

“It is, therefore, settled for us that the oral testimony of one witness is insufficient unless corroborated to sustain a conviction for perjury. We note, however, that the rule, although thus firmly established in the federal courts, has been subjected to much well reasoned criticism. 7 Wigmore on Evidence, 3rd Ed., §§ 2040-2043; *Marvel v. State*, 1925, 33 Del. 110, 3 W. W. Harr. 110, 131 A. 317, 42 A.L.R. 1058. Thus in *Goins v. United States*, 4 Cir., 1938, 99 F. 2d 147, 149 the court said: ‘It may well be doubted whether any distinction should now be made between the proof necessary to convict of perjury and that necessary to convict of other crimes * * *. The old “oath against oath” reasoning of the earlier decisions is without force now that the defendant is allowed to take the stand and that corroboration sufficient to satisfy the jury of the falsity of the oath may well arise from his demeanor and manner of testifying.’ See also *State v. Storey*, 1921, 148 Minn. 398, 182 N.W. 613, 15 A.L.R. 629 in which the court points out with great force that it is inconsistent to hold that evidence which is of the quality sufficient to hang a man for murder is insufficient to convict him of perjury.

* * * * *

“It is true, as the defendant urges, that this testimony did not corroborate Wheatley’s testimony that the defendant had paid him, Wheatley, for voting. But the payment to Wheatley, the individual, was not the crucial fact. Mrs. Jackson’s testimony, if believed, did tend, as did Wheatley’s, to establish the fact that the defendant did pay persons for voting. It, therefore, was sufficient to corroborate the only material fact established

by Wheatley's testimony, namely, that the defendant's assertion that he had not paid any person for voting was false."

And again at page 603, the Court stated:

"It may be conceded, as contended by the defendant, that the evidence relied upon by the Government as corroborative of Wheatley's testimony does not meet the standard for corroborative evidence laid down in *Williams v. Commonwealth*, 1879, 91 Pa. 493, namely, that the particular circumstances testified to as indicating falsity must be corroborated and not merely the falsity of the oath itself. That standard, in our opinion, is unnecessarily rigorous. The exceptional rule of evidence applicable to the proof of perjury is itself, as we have noted, subject to well grounded criticism. We think it would be highly undesirable to intensify the rigor of the rule by engrafting upon it the strict standard laid down in the *Williams* case as to the nature of the evidence which can be accepted as corroborative. We prefer the more liberal application of the rule made in the *Hare* and *Davis* cases, since we think they represent the better view. As we have already indicated, the evidence in the present case meets the test of these cases. It was, therefore, sufficient to support the verdict of guilty."

The issue decided in *Palese, supra*, has not been decided in this Circuit. *Vetterli v. United States*, 198 F. 2d 291, 9 Cir. 1952, judgment vacated on other grounds, 344 U.S. 872, 73 S.Ct. 175, 97 L.Ed. 675. It was, however, raised in that case in circumstances similar to the instant case.

In *Vetterli, supra*, the defendant was charged in two counts with perjury involving testimony before a grand jury. Count I charged that the defendant knowingly denied that he had furnished money to anyone to go to Japan. In support of the conviction, the Government introduced the testimony of a witness, Miwa, that the defendant had given Miwa money to purchase passage on a ship to Japan, that Miwa had used the money for that purpose and actually reached Japan. This Court said at page 292, in connection with the corroboration:

“However, appellant, while conceding this, maintains that the so-called corroborating evidence relied on is insufficient. The question asked and the answer given in response by appellant were so broadly phrased as to potentially cover a number of transactions in which appellant might have been involved in furnishing money to different persons to go to Japan. By witness Miwa’s testimony there was established the occurrence of a single transaction — the furnishing of money to the witness. There is then, posed in the case, a question of whether the corroborating evidence, in order to be sufficient, must tend to establish the same transaction to which the direct witness testified or whether it may show other transactions within the purview of the question asked by the grand jury and thus corroborate the testimony of the direct witness in only a very general sense because it similarly tends to show the falsity of the oath.”

This Court said that it was not required to meet this situation head on because the evidence other than

Miwa's testimony substantiated the single transaction to which he testified. One item of the corroborating evidence was testimony by a Federal Bureau of Investigation agent that after the indictment had been returned against the defendant he had related to the agent facts substantially similar to testimony of the Miwas and admitted that he had given Miwa money for the expenses of their trip to Japan. The appellant in that case contended that his extra-judicial admission was insufficient as a matter of law to serve as a corroborative element of the testimony of Miwa. This Court stressed the fact that the admission was part of the corroborative evidence and not solely relied on to establish guilt. This Court further stated at page 293:

“We stress the fact that the admission was part of the *corroborative* evidence and not solely relied on to establish guilt. The rule of proof required in perjury cases prescribes that the uncorroborated testimony of one witness is insufficient; it does not ‘* * * relate to the kind or amount of other evidence required * * *.’ In the event the corroborative evidence ‘substantiates’ the testimony of the single witness it is sufficient. Admissions of a party charged with perjury, if made under such circumstances as render them clearly admissible, seems to us to have a sound corroborative value.”

This Court further added:

“In other than perjury cases it has been held that the weight of the corroborative evidence supporting a confession need not of itself establish guilt

beyond a reasonable doubt, that it suffices if taken together with the confession such result is achieved. In jurisdictions which hold the uncorroborated testimony of an accomplice insufficient to convict, admissions of the accused have been held sufficient corroboration, and the converse proposition is recognized where corroboration of a confession is required. We do not believe an extra-judicial admission made by an accused is insufficient as corroboration simply because it is such."

In this case the situation is similar. Here there is corroboration in the form of admissions testified to by Special Agents Breen and Coyne which substantiates the testimony of Gail Gordon Campbell and in addition there is the testimony of Special Agent Gunn and the bellmen Denny and Hutchings which establishes the falsity of Florence Umbriaco's oath. See also *Doan v. United States*, 202 F. 2d 674, 9 Cir., 1953.

Whether the characterization of the testimony of the bellmen is as circumstantial or direct there is ample evidence to support the jury verdict on Count II.

CONCLUSION

The appellee and cross appellant submits that this Court should affirm the conviction of Florence Umbriaco on the charge of perjury under Count II of the Indictment, and it further submits that the trial court committed error when it granted Florence Umbriaco's motion for acquittal as to Count I of the indictment and that this Court should reverse and remand as to Count I.

Respectfully submitted,

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